

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JERRY BARNES

Claimant

VS.

GALAMET

Respondent

AND

WAUSAU UNDERWRITERS INS. CO.

Insurance Carrier

Docket No. 1,022,469

ORDER

Claimant requests review of the September 22, 2006 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

It was undisputed claimant suffered accidental injury arising out of and in the course of his employment with respondent on October 11, 2004. Claimant was provided medical treatment but after he was released at maximum medical improvement for the primary injuries he then sought additional medical treatment for a urological condition that he alleged was caused by the accident. Respondent denied that the urological condition was caused by the work-related accident.

The Administrative Law Judge (ALJ) determined that the claimant did not meet his burden of proof to establish that his urological condition was caused or aggravated by the work-related accident. Consequently, the ALJ denied claimant's request for medical treatment for that condition. The ALJ further found the claimant was capable of working and therefore denied claimant's request for temporary total disability compensation.

The claimant requests review and argues that the medical evidence establishes that his current need for urological treatment was "most likely" caused by his work-related injury on October 11, 2004.

Respondent argues that because the issues were claimant's entitlement to temporary total disability compensation and medical treatment the Board does not have jurisdiction to review the preliminary order. In the alternative, respondent requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The first issue is whether the Board has jurisdiction to review this preliminary hearing order. Respondent admitted that claimant sustained an accident on the date alleged and that the accident arose out of and in the course of his employment. However, respondent denied that claimant's urological condition was related to the accident.

An ALJ's preliminary order under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the ALJ exceeded his or her jurisdiction in granting the preliminary hearing benefits.¹ "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."² Whether claimant's medical condition and present need for medical treatment is due to the work-related accident gives rise to an issue of whether claimant's current condition arose out of and in the course of his employment with respondent. Stated another way, this appeal involves a disputed issue of whether the injury arose out of and in the course of claimant's employment. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

At the preliminary hearing on September 20, 2006, claimant provided a somewhat rambling non-specific narrative regarding the nature of his October 11, 2004 accident. According to his testimony, he was hit in the buttocks by a falling line and was thrown 20 yards where he hit his head on a pole and was rendered unconscious.³

Claimant was taken to Occupational Health Services and examined by Dr. Lynn Curtis. The claimant provided a history that a high tension wire broke and struck him on the head glancing off his safety helmet hitting him on the neck. Claimant noted he was

¹ K.S.A. 2005 Supp. 44-551(b)(2)(A).

² K.S.A. 44-534a(a)(2).

³ P.H. Trans. at 9-10.

knocked backwards and lost consciousness. Claimant complained of neck, left arm and mid-back pain.⁴

Claimant testified that he never experienced any problems with sexual function or difficulty obtaining an erection before his work-related accident.

Ultimately, claimant underwent back surgery (apparently at L5-S1) performed by Dr. Douglas C. Burton. In a post-surgery office visit on November 29, 2005, claimant reported that he had experienced erectile dysfunction and had been unable to obtain an erection since the date of his accident. Dr. Burton referred claimant for a urological consult.

Dr. Kevin R. McDonald examined claimant and apparently provided treatment for his erectile dysfunction. In a letter to claimant's counsel dated September 18, 2006, Dr. McDonald diagnosed claimant with organic impotence based upon a neurovascular disruption at the time of his pelvic injury. Dr. McDonald further opined:

In terms as explained the rational of his low back and pelvic injury, I'm not sure there is any test that can really pin point exactly what happened; but I suspect there is some injury to the nerves that exit the low spinal cord and/or possible vascular disruption of some vessels. It is probably a combination of things but since it dates back to the time of his injury, I think it's most likely related to his injury.⁵

Dr. Mark S. Austenfeld examined claimant and was provided a history that claimant was driving heavy equipment when a power line fell on him knocking him from the vehicle resulting in burns and a back injury. The doctor noted that while it was possible the accident contributed to claimant's erectile dysfunction the doctor noted he was not familiar with how a primary electrical injury could cause erectile dysfunction.⁶ In a letter to respondent's attorney dated September 14, 2006, Dr. Austenfeld confirmed that claimant suffers from Hypogonadism, atherosclerotic vascular disease, obesity, diabetes and smokes all of which can cause and contribute to erectile dysfunction. The doctor concluded that he could not determine if claimant's erectile dysfunction was caused or contributed to by his work-related accident. Dr. Austenfeld further confirmed that his diagnostic testing and review of the medical records did not confirm claimant suffered any neurological injury subsequent to his injury or surgery.

⁴ *Id.*, Resp. Ex. C.

⁵ *Id.*, Cl. Ex. 1.

⁶ *Id.*, Cl. Ex. 5.

Among the medical records offered at the preliminary hearing is a letter from Dr. Patrick M. Moriarty which recommended a psychiatric consult for possible post traumatic stress syndrome (electrocution).⁷

The record contains a history of injury, apparently provided by claimant to the physicians, that includes being hit on the head with a high tension wire, being struck in the buttocks by a line, Dr. McDonald referenced a pelvic injury, Dr. Moriarity referenced electrocution and Dr. Austenfeld was told claimant was driving heavy equipment when a power line fell on him knocking him from the vehicle resulting in burns and a back injury. But the contemporaneous medical record on the date of the accident makes no mention of electrocution or burn injury and further reflects claimant's pelvis was not painful.

The ALJ determined:

The opinion of Dr. McDonald is impermissibly tainted in that it relies upon the existence of a pelvic injury that never happened. In addition, the opinion of Dr. Austenfeld suggests there are numerous alternate explanations for the Claimant's problem.⁸

Based upon the record compiled to date, although there appears to be a temporal relationship between claimant's condition and the accident, nonetheless, the medical records fail to identify that claimant suffered a pelvic injury and without further explanation Dr. McDonald's opinion is not persuasive. Moreover, Dr. Austenfeld confirmed that claimant did not have neurological injury which refutes Dr. McDonald's suspicion claimant may have suffered injury to the nerves exiting the low spinal cord. This Board Member affirms the ALJ's September 22, 2006 Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁰

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated September 22, 2006, is affirmed.

⁷ *Id.*, Cl. Ex. 2.

⁸ ALJ Order (Sep. 22, 2006).

⁹ K.S.A. 44-534a.

¹⁰ K.S.A. 2005 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of November 2006.

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge